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RITA NEEDS *GALL*—HOW TO MAKE THE GUIDELINES ADVISORY

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Since the United States Supreme Court changed the face of federal sentencing with *Apprendi v. New Jersey*,[1] it has engaged in substantial mid-course corrections in *Blakely v. Washington*[2] and *United States v. Booker*,[3] and, to a limited degree, in *Rita v. United States*.[4] The pattern of litigation is interesting in and of itself and may bear on the durability of these changes. These were sentencing reforms—a revolution to some—masterminded and led by the highest court in the land, dragging the somewhat reluctant appellate courts with them.

The changes could not have come too soon. To a district court judge who has chafed under the mandatory United States Sentencing Guidelines regime, widely regarded as a failure in many respects,[5] it has been a welcome change. Nor am I alone. District court judges across the country have had the same experience, especially in federal drug cases. You apply the Sentencing Guidelines, as you have been told you must, and you tally up the numbers and determine where the defendant is on the grid, and ultimately come up with a result that makes no sense by any measure. It is inconsistent with the purposes of sentencing in the Sentencing Reform Act (SRA);[6] it is out of proportion to the defendant's culpability and to sentences that have been meted out for far worse, even violent offenses; it is not at all what the public—if they knew all the facts—would demand.[7]

Whatever the ultimate result of the *Booker* changes, one thing is clear: The Supreme Court has unleashed a new sentencing debate, far beyond the tired themes of the past twenty years of guideline reform.

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1. 530 U.S. 466 (2000).
2. 542 U.S. 296 (2004).
3. 543 U.S. 220 (2005).
4. 127 S. Ct. 2456 (2007).
5. *See, e.g.*, Anthony N. Doob, *The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There*, *in* THE POLITICS OF SENTENCING REFORM 199, 199-201 (Chris Clarkson & Rod Morgan eds., 1995); AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING 115 (2003); *see also* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 2 (2006) ("[According to the Guidelines] [s]entencing disparities generally and racial disparities in particular worsened, and proportionality links between the seriousness of crimes and the severity of punishment were broken.").
6. 18 U.S.C.A. § 3553(a) (2007).
7. *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 750-51 (2005).

For most of the past two decades judges have asked only, "Am I doing the same thing as the judge in the next courtroom is doing?"—even if neither judge is ordering sentences that make any sense. Now we are starting to look again at what works, what sentences may make a difference to the offender and to society, and what a just sentencing regime really requires.[8] To be sure, the answers are not clear, but at the very least the issues are being raised.

My hope in this short essay is to go beyond describing the implications of *Rita*, the Supreme Court's latest decision. I attempt to predict how *Rita* is likely to be applied, and argue that an additional course correction by the Supreme Court is needed to make sentencing fully consistent with *Booker*, perhaps one which is already teed up on the Court's docket next year: *United States v. Gall*.[9]

In *United States v. Booker*, as I have described elsewhere,[10] the Supreme Court not only constitutionalized sentencing in a way it had not done before, it altered the sentencing division of labor among the various players in the criminal justice system. Ironically, a decision about the jury's role restored the judge's role in sentencing. So long as the Guidelines *required* judges to find facts that had consequences pre-ordained by the United States Sentencing Commission ("Commission"), what judges did looked exactly like what juries were supposed to do, with few constitutional protections. The result, the Court held, violated the Sixth Amendment.[11] As a remedy, the Court severed the provisions of the SRA that made the Guidelines mandatory.[12] Courts were to "consider" the Guidelines but could sentence individuals in light of all the purposes of sentencing: retribution, deterrence, public safety, and rehabilitation.[13] Appellate courts were to review sentencing decisions for "reasonableness" and not, as they had done before, for their strict fealty to the Guide-

8. Oregon Judge Michael Marcus calls for redesigning the criminal justice system and sentencing decisionmaking around the goal of "rational crime reduction" or "reducing reoffending." *See* Michael H. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO ST. J. CRIM. L. 671, 677-81 (2004). He has created a sentencing information system which focuses not on inputs but on information about available sanctions and recidivism. Michael Marcus: Smart Sentencing, http://www.smartsentencing.com (last visited Sept. 15, 2007). To be sure, there is a substantial debate about how much judges can affect crime rates even through "carefully crafted sentences." Anthony N. Doob & Cheryl Marie Webster, *Looking at the Model Penal Code Sentencing Provisions Through Canadian Lenses*, 7 BUFF. CRIM. L. REV. 139, 154 n.33 (2003). Still others have suggested that well-run and well-targeted programs, particularly with drug offenders, can reduce reoffending rates. Tonry, *supra* note 5, at 6.

9. 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007).

10. Nancy Gertner, *Thoughts on Reasonableness*, 19 FED. SENT'G. REP. 165, 165 (2007); Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 536 (2007); Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. 137 (Supp. 2006), *available at* http://www.thepocketpart.org/2006/07/gertner.html.

11. United States v. Booker, 543 U.S. 220, 245 (2005).

12. 18 U.S.C.A. § 3553(b)(1) (2007).

13. *Id.* § 3553(a)(2).

lines. The Guidelines, in short, were "advisory,"[14] the Court announced. Judicial judgment in sentencing had returned, and not a minute too soon.

Sentencing individual human beings is different from other judicial functions. It is singularly ill-suited to mandatory rules, which are bound to treat as similar offenders and offenses that are in fact meaningfully different.[15] While the United States suffered under the mandatory federal regime for the past two decades, virtually every industrial country continued to give considerable sentencing discretion to trial judges.[16] No matter how different the rest of the judicial system was from ours—adversary versus inquisitorial or common law versus civil code—and no matter how much legislative supremacy was touted or how complex the criminal code, modern sentencing was not governed by strict rules or complex grids. Significant judicial discretion remained.[17]

The difficulties of promulgating mandatory sentencing rules should have been especially clear in the United States. Regional variations in the application of the Guidelines persisted even during the mandatory guideline regime.[18] As federal criminal prosecutions began to overlap more and more with state prosecutions—the federalizing of street crime[19]—the pattern became even clearer. A national sentencing regime may have been possible when criminal law was in fact national and dealt with similar significant federal offenses like bank robbery or mail fraud. As the federal law encompassed street crime to which local and federal prosecutors had different priorities and judicial dockets different exigencies, it was no surprise that regional differences persisted.[20] Finally, a national sentencing regime was made all the more difficult because of continuing problems with the chaotic and disorganized federal criminal code. The code lumped together a wide range of offenders under a single label; the Guidelines did the same, but tried to break them down into smaller subcategories which could be "objectively" evaluated—what was

14. *Booker*, 543 U.S. at 245.

15. *See* Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 276 (2005) (discussing critically undue and excessive concerns about sentencing uniformity in modern sentencing reforms).

16. *See* Nancy Gertner, *When Everyone Behaves Badly*, 57 ME. L. REV. 569, 570 (2005).

17. *See, e.g.*, Cornelius Nestler, *Model Penal Code: Sentencing: Sentencing in Germany*, 7 BUFF. CRIM. L. REV. 109, 109-11 (2003).

18. U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING (AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM) 94 (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf ("The available evidence suggests that regional disparity remains under the guidelines, and some evidence suggests it may have even increased among drug trafficking offenses.").

19. AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 1, 15-16, 16 n.28, *available at* http://www.nacdl.org/public.nsf/legislation/overcriminalization/$FILE/fedcrimlaw2.pdf.

20. *See, e.g.*, Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 78-79 (2006) (arguing that disparities derive from differences in state treatment of criminal convictions, on which guideline treatment is based). *See generally* Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997).

the loss or the amount of drugs, minor or major role, nature of the victim.[21] In fact, as many district courts recognized, the differences that the Guidelines did not take into account—like drug addiction, co-defendant disparity, or mens rea—were often more significant than those it did.[22]

Just how far will the Supreme Court's leadership take us in this new world of sentencing discretion? Other major criminal justice decisions of the Supreme Court, such as *United States v. Lopez*,[23] have gone nowhere and are effectively ignored by the lower courts.[24] Other bold new strokes resulted in retreat as their implications became clear, as was the case with the Supreme Court's double jeopardy jurisprudence.[25] Significantly, other sentencing decisions in the post-guideline era that would have introduced more judicial discretion into the process have also been undermined by the courts charged with applying them. This is not the first time the Supreme Court has told the district courts that there should not be mandatory sentencing. In *Koon v. United States*,[26] the Court underscored the fact that judicial discretion remained even post-Guidelines, and endorsed a review standard, abuse of discretion, that would be more deferential to the trial court. Its message, however, was widely ignored[27] even before legislation was passed that wholly eviscerated it.[28] And when Justice Breyer—an architect of the Guidelines as a member of the first Sentencing Commission—emphasized that judicial discretion in sentencing remained even under a Guideline regime in his decisions as an appellate judge,[29] the Court hardly listened. The First Circuit—the

21. *See* United States v. Ennis, 468 F. Supp. 2d 228, 230 (D. Mass. 2006); Gertner, *From Omnipotence to Impotence*, *supra* note 10, at 535.

22. *See, e.g.*, United States v. Maisonet, 493 F. Supp. 2d 255, 263-65 (D. P.R. 2007) (departing in part based on the extent to which defendant's lifestyle was inconsistent with the quantity of drugs the government would argue should be attributed to him); *Ennis*, 468 F. Supp. 2d at 229-31 (departing in part based on the extent to which defendant's lifestyle was inconsistent with the quantity of drugs the government would argue should be attributed to him); United States v. Jaber, 362 F. Supp. 2d 365, 379, 382 (D. Mass. 2005) (departing downward for the franchisee of a drug trafficking operation so that it was no longer than the sentence for the franchisor who was far more culpable); United States v. Woodley, 344 F. Supp. 2d 274, 275 (D. Mass. 2004) (taking drug addiction into account in evaluating defendant's record); United States v. Costello, 16 F. Supp. 2d 36, 39-40 (D. Mass. 1998) (departing downward for laborers who earned little for transporting valuable computer equipment as compared to the ringleader).

23. 514 U.S. 549 (1995).

24. *See* Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1253-54 (2003).

25. *See, e.g.*, Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 436 (1999).

26. 518 U.S. 81 (1996).

27. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 99-103 (1998).

28. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(b), (g), (i), 117 Stat. 650, 668-69, 671-73 (codified as amended at 18 U.S.C.A. § 3742(e) (2007)) (popularly known as the Feeney Amendment).

29. United States v. Diaz-Villafane, 874 F.2d 43, 52 (1st Cir. 1989) ("[W]e read the Guidelines as envisioning considerable discretion in departure decisions, at least at this early stage of their existence.").

court on which he was about to lead as the Chief Judge—became one of the most mandatory of the mandatory guideline circuits.

Elsewhere, I have tried to understand why federal sentencing has proved to be so resistant to change.[30] Federal judges, who opposed guidelines twenty years ago when they were first proposed and who protested any incursion on sentencing authority, enforced the Federal Sentencing Guidelines with a rigor not required by the text or the legislation.[31] The reasons behind this transformation are critical to evaluating the likely impact of *Booker* and now *Rita*. In short, it takes more than an announcement—"Now hear this! The Guidelines are advisory!"—to make them so.[32]

There are several reasons: First, the Sentencing Guidelines brought with them something like the ideology that surrounds continental civil codes: The Guidelines were comprehensive; the work of "experts"; if there were gaps, the "experts" from the Sentencing Commission would fill them in. The judges became clerks looking through the voluminous Guidelines for sentencing answers.[33] Second, the pernicious anti-judge climate of the past two decades provided every incentive for judges to follow the Guidelines—"I had *no choice* but to sentence you to 150 months under the Guidelines" was a familiar refrain. Third, the judiciary had changed in fundamental ways over the past twenty years, leaving many judges without any criminal justice experience apart from guideline sentencing.[34] Fourth, the psychological phenomenon of "anchoring" when standards are linked to numerical ranges had a substantial impact.[35] Fifth, there was no competing philosophy of sentencing among trial judges; the sentencing Guidelines effectively preempted the field.[36] And this was particularly so in the appellate courts, which had never addressed sentencing at all before the Guidelines.

Given this history, how the Supreme Court defines "reasonableness" review and the weight it gives to the Guidelines is critical. The question is not, as some have suggested, "How can judicial authority be reined in again so that there will not be a return to the days of indeterminate sentencing?"[37] Rather, the question is, "What does it take to restore judicial sentencing authority after nearly twenty years of passivity, after

30. *See* Gertner, *From Omnipotence to Impotence*, *supra* note 10, at 524 (arguing that sentencing, which had been an area of an American judge's "unique competence," became its "polar opposite in twenty short years").

31. *Id.*

32. *See* Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, *supra* note 10, at 137.

33. *See* Gertner, *From Omnipotence to Impotence*, *supra* note 10, at 534.

34. *Id.* at 533 n.40.

35. *Id.* at 535.

36. *Id.* at 533.

37. *See* Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, *supra* note 10, at 137-38.

the judicial culture has fundamentally changed, not to mention the political atmosphere, and after judicial sentencing expertise, to the extent it existed at all, has become vestigial?"[38]

Rita involved a within-guideline sentence that the Fourth Circuit, in a per curiam decision, had affirmed as presumptively reasonable.[39] The decision was problematic for two reasons: First, as I have described, given the past two decades of slavish guideline compliance, the "presumptively reasonable" label will only hasten the slide to "mandatoriness" and hence, constitutional error. Second, the Sentencing Guidelines do not deserve the label. This agency has hardly functioned like the expert agency envisioned by the SRA, much less like the kind of administrative agency to which deference is due. It has been, as Justice Scalia described it, a "junior-varsity Congress."[40]

In addition, for the Guidelines to be truly advisory requires that there be an alternative to guideline-speak. That means that courts necessarily have to be willing and encouraged to engage in two kinds of thinking: First, courts have to be willing to critically examine the Guidelines. Many Guidelines were not keyed to the statute's purposes; various numbers on which sentences were "anchored" were not empirically tested, but often just picked out the air, the product of political compromise.[41] Second, courts have to be willing to develop other approaches, including those rejected by the Guidelines' drafters. Why not consider drug addiction when there is a body of literature about which treatments are efficacious? Why not look afresh at the imprisonment of first offenders given the literature on their recidivism?

How then does *Rita* measure up? It was a mixed decision. It said, in effect, that if appellate courts wish to label the Guidelines "presumptively reasonable" they may (within certain limits), but they are not required to do so.[42] The Court did not cast its lot with the "Guidelines are presumptively reasonable" group, as the government urged and many appellate courts found. Nor did it conclude that the Guidelines were

38. Gertner, *Thoughts on Reasonableness*, *supra* note 10, at 165 (suggesting that the Court look to areas that involve similar institutional questions about the allocation of decisional authority, such as appeals under the Administrative Procedure Act (APA) as well as federal habeas review under the Antiterrorism and Effective Death Penalty Act (AEDPA), and further suggesting that the question for courts of appeals under the APA and federal habeas is not whether the initial decision maker was wrong in its interpretation or application of law, that is, whether the reviewing court would have made a different decision. Rather, the question is whether the initial decision maker was "unreasonably wrong.").

39. United States v. Rita, 177 F. App'x 357, 358 (4th Cir. 2006) (per curiam).

40. United States v. Mistretta, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

41. *See* United States v. Jaber, 362 F. Supp. 2d 365, 371-77; *see also* STITH & CABRANES, *supra* note 27, at 95 (describing Guidelines as a set of "administrative diktats" that the Commission "promulgated and enforced *ipse dixit*"). "Even for those categories of cases in which the Commission did indeed seek to replicate past sentencing averages, the Commission's data was limited, and possibly compromised, in several fundamental respects." *Id.* at 61.

42. Rita v. United States, 127 S. Ct. 2456, 2462-63 (2007).

merely one factor among many, as the federal defenders and Justice Souter, in dissent, had suggested.[43] There is, in short, something for everyone here. On the one hand, *Rita* (with Justice Breyer writing for the majority) dilutes the impact of the "presumption of reasonableness" even as it affirms its use. This presumption is not a binding presumption like trial-related evidentiary presumptions which oblige one side or the other to shoulder a particular burden of proof.[44] Nor does it reflect the kind of deference that a court is obliged to give to an expert agency rather than a district judge. And it is an appellate presumption, not a district court standard.[45]

Nevertheless, Justice Breyer's reasoning surely gives the Guidelines the kind of "gravitational pull" of which Justice Souter warns.[46] As the Court notes, the presumption reflects the fact that, by the time an appeals court is considering a within-guideline sentence on review, "*both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case."[47] That "double determination," the Court held, "significantly increases the likelihood that the sentence is a reasonable one."[48] In other words, "sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale."[49] The problem is that Justice Breyer's comments overstate both the reasonableness of the Guidelines and the nature of the trial sentencing process that has been so completely skewed by them. It envisions two fully developed processes that happily coincide on the reasonable sentence. The reality is quite different.

With respect to the Guidelines: Justice Breyer's analysis of the Guidelines' rationale reiterates the *ideology* of the Guideline formation—not their actual genesis or operation. In fact, it mirrors the very ideological framework, which I have described, that Justice Breyer played a substantial role in creating and has for years attempted to implement.[50] In

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43. [I]f sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right. For a presumption of Guidelines reasonableness would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done, with judges finding the facts needed for a sentence in an upper subrange. This would open the door to undermining *Apprendi* itself, and this is what has happened today.

Id. at 2487 (Souter, J., dissenting).

44. *See id.* at 2463 (majority opinion).

45. *Id.*

46. *Id.* at 2487 (Souter, J., dissenting).

47. *Id.* at 2463 (majority opinion).

48. *Id.*

49. *Id.*

50. The Guidelines introduction, quoted liberally in *Rita*, mirrors Justice Breyer's comments in Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988).

fact, this account of the bona fides of the Sentencing Commission and its product gave rise to the presumption of reasonableness in the post-*Booker* era in the first place.[51] And once again, in *Rita*, Justice Breyer described his hopes that Guidelines post-*Booker* can coexist alongside a more robust judicial discretion, notwithstanding the unsuccessful attempts to do just that in *Koon* (when Justice Breyer was on the Supreme Court) and *Diaz-Villafane* (when Justice Breyer was on the First Circuit). While his language is tempered—he acknowledges that the guideline drafters eschewed identifying which of the sentencing purposes they were enacting,[52] and he concedes that the Guidelines are "a rough approximation of sentences that might achieve § 3553(a)'s objectives"[53]—the effect may well be the same. The Court in effect says that where the sentence is within the Guidelines, the trial court does not have to say much to justify it. To busy courts, *that alone* has a gravitational pull.

As far as the trial judges' sentencing processes are concerned, the Court ignores the extent to which the Guidelines have profoundly altered sentencing advocacy. Parties—even post-*Booker*—continue to argue in terms of guideline facts,[54] rarely even developing a guideline critique much less an alternative rationale for sentencing. Discovery regarding sentencing factors is not covered by the federal rules.[55] Defendants continue to fear that if they press for additional discovery, or indeed litigate

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51. *See* United States v. Wilson, 350 F. Supp. 2d 910, 912-21 (D. Utah 2005). *Wilson* was issued within days after *United States v. Booker*; it announces in language very similar to Justice Breyer's in *Rita* that a guideline sentence must be given "considerable weight." *Id.* at 912. The "presumptively reasonable" courts base their analysis on very similar logic. *See, e.g.*, United States v. Green, 436 F.3d 449, 456-57 (4th Cir. 2006), *cert. denied*, 126 S. Ct. 2309 (2006); United States v. Newsom, 428 F.3d 685, 686-87 (7th Cir. 2005).

52. *Rita*, 127 S. Ct. at 2463; *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1. n.3 (2006) (noting that the U.S. Sentencing Commission could not "reconcile the differing perceptions of the purposes of criminal punishment"); Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18046, 18121 (May 13, 1987) ("Of all of the goals of the Sentencing Reform Act, it is most unfortunate that the goal of rationality has been abandoned and even frustrated by these guidelines."); Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 465 (2006) (noting the "Commission's failure to articulate a philosophy for federal sentencing").

53. *Rita*, 127 S. Ct. at 2465.

54. *See, e.g.*, United States v. Maisonet, No. 06-150(JAG), 2007 U.S. Dist. LEXIS 46768, at *6-7 (D. P.R. June 26, 2007) (noting that Counsel only developed a record of guideline-specific facts).

55. Sentencing Guidelines Policy Statement § 6A1.2 opines that "[c]ourts should adopt procedures to provide for the timely disclosure of the presentence report." Sentencing Guidelines for United States Courts, 53 Fed. Reg. 15530, 15535 (June 15, 1988). And § 6A1.3 of the Guidelines Manual goes on to declare that "parties shall be given an adequate opportunity to present information to the court." U.S. SENTENCING GUIDELINES MANUAL, *supra* note 52, § 6A1.3(a). But the Guidelines nowhere require disclosure of the evidence on which the probation officer relies in preparing the presentence report, or advance disclosure to the defense of the "information" the government intends to "present . . . to the court." *Id.* While FED. R. CRIM. P. 16 requires the disclosure of facts necessary to proof of guilt, that may not be the same as facts at issue in sentencing. In any case, Rule 16 obligations arguably end at the plea. The obligation to disclose exculpatory evidence continues past the plea and covers issues which would diminish a defendant's punishment, but what that consists of is frequently a matter of dispute.

anything, they will risk a higher guideline sentence.[56] Some prosecutors have added discovery waivers to plea agreements.[57] Probation officers are not trained or encouraged to engage in anything other than "guideline-speak." Without information or advocacy with respect to alternatives outside of the Guidelines, "presumptive" will, once again, slide to "mandatory," or something short of that: namely, "Guidelines-Lite."

Take the case of Victor Rita:[58] Mr. Rita was charged with making two false statements to a federal grand jury.[59] The grand jury was investigating InterOrdnance, a company prosecutors believed distributed a kit capable of assembling a machine gun without proper registration.[60] After Rita had bought one of the kits, he was contacted by the Bureau of Alcohol, Tobacco, and Firearms and Explosives (ATF).[61] Before meeting with the agent, however, Rita returned the kit and turned over to the ATF another which did not amount to a machine gun.[62] He then denied before the grand jury that the government had asked him for the machine gun kit, and denied that he contacted someone at the company after he was contacted by the ATF.[63] The government charged Rita with perjury, making false statements, and obstructing justice. He was convicted on all counts before a jury.[64]

The guideline offense level was driven by the offense level of the underlying crime with respect to which the perjury was committed, here InterOrdnance's possible violation of the machine gun registration law.[65] The level for perjury in connection with that offense required taking as the offense level "6 levels lower than the offense level for the underlying offense."[66] The underlying offense level was 26;[67] thus the base offense

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56. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 443-64 (2004) (arguing that the Sentencing Guidelines system deters effective advocacy and penalizes zealous representation by equating it with the defendant's obstruction of justice or failure to accept responsibility).

57. Erica G. Franklin, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 567 (1999).

58. It should be noted that the Defendant moved for a rehearing after the President commuted the sentence of Lewis Libby, arguing that the government was taking inconsistent positions. Petition for Rehearing, Rita v. United States, 127 S. Ct. 2456 (2007) (No. 06-5754), 2007 WL 2155533.

59. Rita v. United States, 127 S. Ct. 2456, 2459 (2007).

60. *Id.*

61. *Id.* at 2460.

62. *Id.*

63. *Id.*

64. *Id.*

65. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 52, § 2M5.2 (sentencing for violation of 22 U.S.C.A. § 2778(b)(2) (2007) (importing defense articles without authorization)).

66. *Id.* § 2X3.1.

67. *Id.* § 2M5.2.

level was 20.[68] Rita had a criminal history of I, leading to a guideline range of 33 to 41 months.[69]

The defense presented evidence that Rita had an extensive record of government service, was a dedicated family man, and had a number of physical ailments attributable to his military service.[70] For 24 years, Rita had served in the United States Marine Corps, the United States Army, and the United States Army Reserve.[71] His service included tours of duty in Vietnam and the Gulf Wars, and he had received more than 35 awards and medals for distinguished conduct.[72] As a result of his service he had several ailments, including skin rashes following exposure to Agent Orange during the Vietnam War as well as post traumatic stress disorder.[73] He also had diabetes, which caused him periodic numbness in the feet as well as memory and eyesight loss.[74] He suffered from arthritis, an enlarged prostate, acid reflux, a herniated disk, and sleep apnea.[75] To treat these conditions, Mr. Rita—who was 59 years old—required a long list of prescription medications.[76] His service had left him so disabled that he was totally and permanently unemployable.[77]

At sentencing, the district court heard Rita's presentation but concluded that it was "unable to find that the [presentence] [report's recommended] sentencing guideline range . . . is an inappropriate guideline range for that, and under 3553 . . . the public needs to be protected if it is true, and I must accept as true the jury verdict."[78] In light of Rita's personal history and physical condition, what would it have taken to convince the judge otherwise? Clearly, the court's remarks suggest that Rita had to show that he was somehow extraordinary, not the usual person in this guideline range. That harks back to the pre-*Rita* days and a "heartland" analysis that rarely succeeded.[79] Indeed, the Solicitor General said as much during the argument.[80] To credit a non-guideline approach here, he argued, would be subjective, and would risk the return of sentencing disparities: "[W]e are in a Federal system with 674 Federal district judges, and we cannot have all our own personal guidelines systems."[81]

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68. Of course, nothing in the Guidelines indicates why the Commission chose six levels, rather than four or three.

69. *Rita*, 127 S. Ct. at 2461.

70. Petition for Rehearing, *supra* note 58, at *4, *5.

71. *Id.* at *5.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at *6.

78. Rita v. United States, 127 S. Ct. 2456, 2462 (2007) (second alteration in original) (citation omitted).

79. *Id.* at 2461; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 52, § 5K2.0.

80. Transcript of Oral Argument at *37, *Rita*, 127 S. Ct. 2456 (No. 06-5754), 2007 WL 519826 (oral argument of Deputy Solicitor General Michael Dreeben).

81. *Id.*

He used as an example of an unreasonable sentence one in which the judge "takes a guidelines range like this one, of 33 months to 41 months, and the judge says in my view military service means that this defendant gets probation."[82]

Of course, no judge should say, "Military service in *my personal guideline* system means this defendant should get probation" (although, to be sure, that comment may be no more rational than the Commission, which held without explanation that such service *should never* be included). A judge might say, instead, that the Guideline that excludes military service from consideration may be appropriate in general,[83] but that in this case—in light of Rita's minimal criminal history, age and illness—it is not. A judge might say that the guideline result in this case is inconsistent with statutory edict. Section 994(j) of the SRA ordered the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ."[84] The Commission, however, implemented that directive by redefining "serious offense" in a way that was entirely at odds with prior practice, without empirical support, and, in fact, inconsistent with its own deterrence studies.[85] A reasoned critique of the Guidelines is hardly the "personal guidelines system" the Solicitor General mocked.[86] Indeed, it might well become a new national standard in like cases.

In short, the fact that a district court's sentence is aligned with that of the Commission does not necessarily indicate that there was careful reflection about what the appropriate sentence should have been, but may simply reflect a judge's good faith effort to comply with the Guidelines (knowing their traction even post-*Booker*), or the failure of effective advocacy at sentencing. In *Rita*, the district court did not have to say very much to justify the Guideline sentence—no opinion, no detailed findings. And for the Fourth Circuit, all it took to affirm it was a per curiam opinion. The "gravitational pull" of the Guidelines, particularly in a circuit that is amenable to the "guidelines as presumptive" approach, limits sentencing arguments, stops meaningful critique of the Guidelines, and encourages cursory treatment of the sentence on all levels, at trial and on appeal.

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82. *Id.* at *38.

83. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 52, § 5H1.11 (prohibiting consideration of military service without explanation or legislative history). Section 5H1.11 was enacted—without explanation—to overrule *United States v. Pipich*, 688 F. Supp. 191 (D. Md. 1988). *See* Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Bedfellows*, 104 YALE L.J. 933, 955-56, 956 n.134 (1994).

84. 28 U.S.C.A. § 994(j) (2007).

85. United States v. Germosen, 473 F. Supp. 2d 221, 228 (D. Mass. 2007).

86. Transcript of Oral Argument, *supra* note 80, at *37.

Where will the Supreme Court go from here? *Gall v. United States*[87] will give the Court an opportunity to stop the gravitational pull of the Guidelines, or, at the very least, create an equal and opposite force, a paradigm of what a non-guideline approach might look like. In *Gall*, the defendant pleaded guilty to one count of conspiracy to distribute MDMA, commonly known as "ecstasy."[88] He had participated in a conspiracy that involved ecstasy distribution from February 2000 until September 2000. The conspiracy predated his entrance, beginning May 1996, and continued long after he left, until October 2002. Although he was making a considerable amount of money, which, as a working class young man he sorely needed, in September 2000 he informed his co-conspirators that he was "getting out of the drug business and wanted nothing more to do with [it]." His withdrawal was voluntary, as there was no hint of a government investigation at the time.[89] And he stayed out of the drug business, fully believing his criminal days were behind him, until an indictment was filed in April 2004. By that time the defendant had started a business; earned a Bachelor of Science degree in computer science; was supported by coworkers and family; and had begun to come to grips with his alcohol and drug addiction. Numerous witnesses testified on his behalf about the changes that he had effected between 2000 and 2002. The record disclosed his company was on the verge of beginning a major construction project when he was indicted. He had the lowest criminal history score, Criminal History I, with a few minor offenses. He offered to cooperate with the government, but since his information was stale—he had left the conspiracy long before—he had nothing to offer prosecutors.

The Guidelines calculation was classic. It was driven by the quantity of MDMA tablets involved during the conspiracy, resulting in an offense level of 24.[90] The defendant received some reductions for his acceptance of responsibility, and willingness to give an accurate proffer, but they paled in comparison to the offense level. He received a two point reduction under § 5C1.2 of the Guidelines for being "'safety valve' eligible," and a three point reduction for "acceptance of responsibility."[91] The adjusted offense level was 19, yielding a guideline range of 30 to 37 months.[92]

The defendant made several departure motions based on his age, cooperation with the government, remorse, aberrant conduct, and post-

87. 127 S. Ct. 2933 (2007) (granting certiorari).

88. Unless otherwise noted, the following factual background is from *United States v. Gall*, 446 F.3d 884, 885-88 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007) [hereinafter *United States v. Gall*].

89. Unless otherwise noted, the following information pertaining to Gall's personal history is taken from *United States v. Gall*, 374 F. Supp. 2d 758, 761 (S.D. Iowa 2005) [hereinafter *Gall*].

90. *Id.* at 760.

91. *Id.*

92. *Id.*

offense rehabilitation.[93] However, given the Eighth Circuit's departure law, all pre-*Booker*, the Court felt there was no basis for a departure.[94]

The trial court, taking into account the factors under 18 U.S.C. § 3553(a), decided, in effect, that any term of imprisonment was counterproductive and wholly unjustified.[95] In effect, as described above, the judge "added up the column of figures"[96] and concluded that the total made no sense by any measure. The offense level, based solely on drug quantity, substantially overstated Gall's actual culpability. Indeed, many of the salient factors here—both as to recidivism and culpability—were simply not counted: his age, his withdrawal from the conspiracy, the life he had built. There was, in short, a significant difference between Gall and most offenders in this category, a difference which was understandable and reasoned. The trial court sentenced Gall to probation for three years.[97]

The Eighth Circuit, a "presumptively reasonable" circuit, reversed.[98] First, the court's approach made outside-the-Guidelines sentences extremely unlikely, every bit as unlikely as in the pre-*Booker* days. The court noted that how compelling the justification for the variance had to be depended upon the extent of the difference between the guideline range and the sentence imposed.[99] Since the guideline range was 30 months, a probation sentence amounted to a 100 percent variance—an extraordinary one that had to be supported by extraordinary reasons.

The district court's reasons—articulated both on the record and in a lengthy decision, and far, far more elaborate than the district court's reasons in *Rita*—did not suffice. First, according to the Eighth Circuit, the district court placed too much emphasis on Gall's withdrawal from the conspiracy when the Guidelines had already accounted for that by applying the Guidelines from an earlier, and more lenient book, and by the fact that Gall was not being held accountable for the drugs of other co-conspirators.[100] Second, the district court gave inappropriate consideration to Gall's age, which the Guidelines do not permit.[101] Third, the

93. *Id.* at 760-61.

94. *United States v. Gall*, 446 F.3d at 889. There is at least an argument that one way to address potential disparity post-*Booker* is to reevaluate this departure law, now in the light of 18 U.S.C.A. § 3553(a) (2007). Departure law evolved when the Guidelines were mechanically applied; few appellate court decisions keyed their holdings to anything other than the specific language of the Guidelines—under which family circumstances were evaluated for "extraordinariness" rather than in light of their effects on recidivism or deterrence. *See* United States v. Germosen, 473 F. Supp. 2d 221, 222-23 (D. Mass. 2007); United States v. Ennis, 468 F. Supp. 2d 228, 229 (D. Mass. 2006).

95. *Gall*, 374 F. Supp. 2d at 763.

96. *Id.* at 760.

97. *Id.* at 763.

98. *United States v. Gall*, 446 F.3d at 889 (quoting United States v. Myers, 439 F.3d 415, 417 (8th Cir. 2006)).

99. *Id.*

100. *Id.* at 889-90.

101. *Id.* at 890.

court did not properly weigh the seriousness of ecstasy distribution, as the Guidelines provide.[102] Fourth, the court did not consider whether his sentence would create "unwarranted sentencing disparities,"[103] which the Guidelines were intended to eliminate. And fifth, the court placed too much emphasis on post-offense rehabilitation, another ground demeaned by the Guidelines.[104] In effect, the court was saying, as courts have done for two decades, that the Guidelines cover pretty much everything and everyone.

This was not a review as under the AEDPA or the APA. There was no consideration of a range of reasonable sentences, including the sentence imposed by the thoughtful trial court judge who had heard witnesses, lived with the case, sentenced the codefendants and had written an opinion. This was a decision that said: "The Guidelines are the gold standard; deviate from them at your peril."

To be sure, the government might say here, as it did in *Rita*, that the trial court's decision was nothing more than the "personal" weighing of one judge—like the judge who would have "personally" valued military service in his guideline universe. And it will say yet again: If judges are permitted to do this, disparity would reign again as it had pre-Guidelines.

That position wholly ignores the impact of two decades of guideline analysis on judges and advocates, and of the continued traction of the Guidelines, whether or not they are labeled as mandatory. And it ignores the way the common law evolves, the way judges persuade other judges, the way judicial precedents are created. If the trial court's reasoning is applied by other judges in like cases, it will not be because they wish to implement their own normative imperatives, but because they have been *persuaded by the court's reasoning.* New standards will evolve alongside the guideline standards. Surely, judges can be trusted to make meaningful distinctions—which the Guidelines as a national system could not make—between co-conspirators who find religion with the constable at the door, and those who do not; between individuals who do everything that prison is supposed to get them to do—put their lives in order, secure a job, an education, address their addictions. Surely, the public would understand the difference between Gall and his co-defendants. And surely judges can be trusted—indeed, encouraged—to think critically, like lawyers are supposed to do, about these Guidelines and the rules they have created, about when they should apply and when they should not.[105]

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102. *Id.*

103. *Id.* (quoting 18 U.S.C. § 3553(a)(6) (2006)).

104. *Id.*

105. In *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007), I applied the aberrant conduct guideline to a defendant, a drug "mule," recognizing that the language did not strictly apply, but noting the deficiencies of the guideline analysis in cases like the one before me. I mentioned the

Gall offers the Supreme Court an opportunity to say what it did not say in *Rita*. Sentencing is an imperfect exercise. The Guidelines were flawed; as the Guidelines' Introduction conceded,[106] they could not possibly account for the full range of sentencing situations. If the reasons offered in *Gall* do not pass muster while those in *Rita* do, *Booker* will have gone the way of *Koon* and the sentencing reforms it triggered will be at an end.

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government's concerns whenever factors like employment or family are added to the equation, and the risk that in considering those factors, white collar offenders will be treated too leniently. I held:

> True, some of the letters to the Commission by groups interested in the [aberrant conduct Guideline] were concerned about the abuse of aberrant behavior departures in the case of white-collar offenders. But those concerns do not apply here. This case is not about the well-heeled banker who commits a substantial fraud, all the while supporting the local symphony and countless community groups. It is not about white-collar offenders who try to buy their way out of trouble by pointing to their charitable contributions. This case involves a man who struggled all his life, supported his community at great personal risk, and then made a mistake. *It is not about Enron. It is about a drug mule.*

Id. at 223-24 (emphasis added).

106. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 52, § 1A1.1 (Historical Note 4(b)) (explaining its policy, the Commission noted that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.").